Individual Recovery for Defamation of a Group*

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The words "group defamation" in the title are apt to be misleading in any treatment of civil liability for libel. Such liability will ultimately lie only where the group is an integrated organism recognized or recognizable as a unit having legal power to sue, or in the case of an individual member of the group where the individual has been damaged and can show that the libel was directed either against him as an individual, or apparently directed against a group but in reality striking him as an individual, so as to indicate a reckless disregard for his rights.

Such difficulty as arises in analyzing precedent and in the application of the law arises from the commingling of opinion in the civil and criminal branches. In the criminal branch of the law there is a long history of the use of group libel as a repressive political force.[1] This has, however, led to opinions in civil cases which have discussed group libel as having a potency beyond the proper growth of civil liability.

In early Roman law, and probably in periods before that, those in possession of the machinery of the state utilized that machinery to maintain themselves in power. They were sensitive to criticism and they therefore censored the dissident. The very name which they gave to their laws for the protection of the emperor and others against libel, *i.e., Libelli Famosi,* (Ulp., D. 47. 10.5.9) gives the story away. These laws, of course, were enacted by the groups in power and the libel was always of those who occupied great position.

Likewise the first English law on the subject was entitled De Scandalis Magnatum (1275). This statute, following the pattern of Roman law, sought to protect the then rulers of England against the revolt of a rising peasantry. Down through the days of the Stuart despotism and the Star Chamber we find a similar pattern, so that the Star Chamber could say:

> Let all men take heede how they complayne against any magistrate for they are Gods.

This pattern in which libels of the groups were libels of upper classes was to continue in England until the Nineteenth Century. The general notion was expressed by Coke that:

> the blame of public men being a more serious matter than the blame of a private man.

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[1] Beauharnais v. Ill., 343 U.S. 280 (1952) n. 7.

The notion that the king could do no wrong lay at the basis of protecting not only the king but his judges and counsellors as groups, and the laws were well entitled against "seditious libel."

But the Reformation intervened. Feudal status was giving way to financial and commercial position. The individual was emerging as a potent social force and the power of the united clergy and peerage was waning. Libel which had theretofore been concerned with those who had status became more and more concerned with those who had wealth. The reparation which the laws of libel now offered was not so much to honor as it was to ability to earn and to have and to hold property. This development shows itself clearly in the early history of libel in the United States and in the differences that existed in the laws of the United States and of England. In England, still honoring doctrines of libel affecting the great and upper classes, truth was not a defense, for to say of a naked king that he was naked was just as offensive as to say of a well clothed king that he was naked. It was not until 1710 that the last case was brought under a successor to the statute De Scandalis Magnatum, and it was not until late in the Eighteen Hundreds, after a series of intervening statutes, that truth was finally established as a defense. This fight for the truth as a defense was intimately concerned with and is a part of the history of group libel, for it was in connection with seditious libel of the Roman groups that the doctrine of the truth as no defense gained strength. (De Libellis Famosi, 5 Rep. 125a)

Following a false start[2] based on English precedent, the United States more rapidly developed the doctrine under which the individual might recover when he proved that it was he who was aimed at and hit though a group was named.[3] In America with its

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[2] Sumner v. Buell, 12 Johns (N.Y.) 475 (1815).

[3] *Individual cause of action lay*: Gidney v. Blake, 11 Johns. (N.Y.) 54 (1814); Ryckman v. Delavan, 25 Wend. (N.Y.) 185 (1840); Bornmann v. Star Co., 174 N.Y. 212, 66 N.E. 723 (1903); Weston v. Commercial Advertiser Assn., 184 N.Y. 479, 77 N.E. 660 (1906); Gross v. Cantor, 270 N.Y. 93, 200 N.E. 592 (1936); Kirkman v. Westchester Newspapers, Inc., 287 N.Y. 373, 39 N.E. 2d 919 (1942); Hauptner v. White, 81 App. Div. 153, 80 N.Y. Supp. 895 (1903); DeHoyos v. Thornton, 259 App. Div. 1, 18 N.Y. S. 2d 121 (1940); Marr v. Putnam, 196 Or. 1, 246 P. 2d 509 (1952); Levert v. Daily States Pub. Co., 123 La. 594, 49 So. 206 (1909); Ellis v. Kimball, 16 Pick (Mass.) 132 (1834); Byers v. Martin, 2 Colo. 605 (1875); International Textbook Co. v. Leader Publishing Co., 189 Fed. 86 (N.D. Ohio 1910).

No individual cause of action lay: Sumner v. Buell, 12 Johns. (N.Y.) 475 (1815); Hays v. American Defense Society, 252 N.Y. 266, 169 N.E. 380 (1929); Feely v. Vitagraph Co., 184 App. Div. 527, 172 N.Y. Supp. 264 (1918); Oma v. Hillman Periodicals, 281 App. Div. 240 (1953); Lynch v. Kirby, 74 Misc. 266, 131 N.Y. Supp. 680 (1911); Matter of Payne, 160 Misc. 224, 290 N.Y. Supp. 407 (1936); Latimer v. Chicago Daily News, Inc., 330 Ill. App. 295, 71 N.E. 2d 553 (1947); Watson v. Detroit Journal Co., 143 Mich. 430, 107 N.W. 81 (1906);

concepts of free speech and of the rights of the individual we have never recognized the ancient doctrine of class libel which would protect any group in the practice of political, religious or other discrimination. There have been attempts to utilize the libel laws for those purposes, but such attempts have been confined to the criminal branch.

After the first attempt to find our legal feet in this field it was evident that group libel would be the basis of civil liability when the group could be segregated so that it had a unity which amounted to a substitute for personality. The ancient concepts of a ruling class which needed protection and for whose benefit group libel laws were passed was fading. The ecclesiastical hierarchy and the political peerage were disappearing. With the rise of the Protestant religion, the individual and the groups which he formed for his financial and social betterment, were coming to the fore.

The industrial revolution was creating new legal organizations. Private corporations were gaining recognition. Our society was faced with the problem of how far group libel could survive and along what lines the development of the law would go. In a democracy it was necessary to strike a balance between individual protection and social need. Where free speech is important the individual must sometimes give way and allow criticism, even to the point of defamation. This is apparent from our doctrines of libel in the political field. Henceforth general social considerations rather than a regard for a specific power would determine the membership of which groups would be legally protected and new definitions would have to be found and applied. In part they went this way.

There are amorphorous groups indicating large divisions among mankind which are not recognizable as groups having integrated form which society will recognize as a proper party plaintiff. So we find the world divided on the basis of color into white, black, yellow, red, brown and tan, and a combination of these colors. It is obvious that there are people of these colors scattered all over the face of the world, and remarks addressed about them would not indicate any integrated group. So again we find Moslems,

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Kassowitz v. Sentinel Co., 226 Wis. 468, 277 N.W. 177 (1938); Comes v. Cruce, 85 Ark. 79, 107 S.W. 185 (1908); Noral v. Hearst Publications, Inc., 40 Cal. App. 2d 348 (1940); Louisville Times v. Stivers, 252 Ky. 843, 68 S.W. 2d 411 (1934); Arnold v. Ingram, 151 Wis. 438, 138 N.W. 111 (1912); Helmicks v. Stevlingson, 212 Wis. 614, 250 N.W. 402 (1933); American Civil Liberties Union v. Kiely, 40 F. 2d 451 (2d Cir. 1930); Service Parking Corporation v. Washington Times Co., 92 F. 2d 502 (D.C. Cir. 1937); Fowler v. Curtis Publishing Co., 182 F. 2d 377 (D.C. Cir. 1950); Brewer v. Hearst Pub. Co., 185 F. 2d 846 (7th Cir. 1950); Watts-Wagner Co. v. General Motors Corporation, 64 F. Supp. 506 (S.D. N.Y. 1945); Neiman-Marcus Co. v. Lait, 107 F. Supp. 96 (S.D. N.Y. 1952).

Christians, Catholics, Protestants, Buddhists, Jews, Zorastrians and members of other religions, distributed over the face of the earth, though some of them find greater aggregation in particular regions. These groups are too large, too diffuse, to be recognizable as the type of collective organism any one of whose members might sue for a libel directed against the group. Even in politics we find common designations making strange bedfellows, for Republicans and Democrats, the major political parties in the United States, find their names duplicated in other countries whose forms of government are not even republican or democratic but who loudly proclaim their adherence to republican and democratic tradition. The use of the words "Republican" and "Democratic" do not generally designate any group of persons having status as such. It is only in particular instances where they can be segregated as corporate or legally recognizable groups that they attain legal status.

From the great groups we come to secondary groups of trades or professions. So the words "lawyers," "doctors," "dentists," "performers" or "taxi-drivers," are words indicating all those who follow a specific trade or profession, and in the absence of confinement and localization indicate groups too undifferentiated to have legal status.

A reference to any of these large undifferentiated groups may actually be aimed at a limited portion of the totality, thus describing an integrated recognizable body. So Moslem may denote a general religion. It does not prevent a specific group of Moslems organized into a specific church in a specific community and having a well defined membership from acquiring legal status. Republican, Democratic or other appellation indicating political adherence to a specific idea or "ism" may be vague or indefinite, but "Democratic Benevolent Association of the Seventeenth Ward" in a named city may be a group specific enough to warrant inclusion amongst possible plaintiffs. With regard to description in terms of color one can imagine a community in which white men are in the minority. One can also conjure up an association of those men, consisting of a number so small, that they could be recognizable as a separate group. So each of the largest possible groupings not as such recognizable as a possible party plaintiff might in splinter form be a body discernible by the law as having those attributes which could suffer harm by invidious description or harmful word.

Our own times, colored as they have been by great wars and cold wars, have yielded many examples of group libel or attack. So we have seen the entire Protestant clergy of America attacked by quasi governmental officials. We have seen Bar Associations labelled as subversive. We have seen all manner of organizations, including professorial organizations, labelled as "Red" — a term

held libelous. We have seen in at least one instance involving a great public scandal a young lawyer held up to scorn and ridicule by reason of his having been a member of a Bar Association which had been described as subversive. It is obivious that group libel is at this time reaching a great flowering, more putrescent perhaps than beautiful.

There are lesser aggregations which have been recognized as having the ability to sue as a group in civil libel. Amongst them have been corporations,[4] partnerships,[5] unincorporated associations[6] such as trade unions and charitable organizations. The test in each case has been whether the group can be recognized to have a form that is not amorphous. Whether it has such a stake in society that an attack upon its reputation will lessen its efforts towards the purposes for which it was created was the rationale behind allowing charitable organizations, which theoretically have no commercial end, to sue. In the case of trade unions, though they were organized purely for the benefit of their individual members, the union was recognized as having sufficient identity so that it could sue when its reputation was attacked to the point where it would lessen its capability for use within the sphere of its own function.[7]

The division therefore consists of large indivisible precisely undefinable groups which may break down into smaller fractions of the whole which are recognizable and definable and which have legal capacity to sue. Still we have not reached the individual, for the libel which is ostensibly of a group, must in reality be a libel by reference or imputation to an individual if there is to be an individual cause of action. In a proper sense there is no libel of the group. There is libel of individuals referred to by a group term which when pierced discloses the individuals. So in each of these instances above the individual members or officers did not by reason of the group attain the stature of a party plaintiff as an individual because of the damage done the group. It was the group

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[4] Pullman Standard Car Mfg. Co. v. Local Union 2928, United States Steelworkers of America, 152 F. 2d 493 (7th Cir. 1945); Reporters Association of America v. Sun Printing & Publishing Association, 186 N.Y. 437, 79 N.E. 710 (1906); Curtiss-Wright Corp. v. Mitchell, 10 F. Supp. 91 (E.D. Va. 1935).

[5] Taylor v. Church, 8 N.Y. 452 (1853); Funk v. Even. Post Pub. Co., 152 N.Y. 619, 46 N.E. 292 (1897); Collier v. Postum Cereal Co., 150 App. Div. 169, 134 N.Y. Supp. 847 (1912).

[6] Kirkman v. Westchester Newspapers, Inc., 287 N.Y. 373, 39 N.E. 2d 919 (1942); New York Society for Suppression of Vice v. Macfadden Publications, Inc., 260 N.Y. 167, 183 N.E. 284 (1932); Finnish Temperance Society v. Socialistic Publishing Co., 238 Mass. 345, 130 N.E. 845 (1921); Bradley v. Conners, 169 Misc. 442, 7 N.Y.S. 2d 294 (1938); Lubliner v. Reinlib, 184 Misc. 472, 50 N.Y.S. 2d 786 (1944).

[7] Kirkman v. Westchester Newspapers, Inc., 287 N.Y. 373, 39 N.E. 2d 919 (1942).

considered as an entity, having a legally recognizable form, to which the right to sue was extended. So in the case of the union, the individual officers were not allowed a cause of action.[8] In the case of a partnership, the individual partners were not allowed a cause of action.[9] In the case of a corporation, the officers and directors would not as such have a cause of action for themselves.

For the individual to have a cause of action he must be able to demonstrate that the libel was uttered of and concerning him even though disguised by the use of a group label or one which would seem to be levelled at the anonymous members of a group. The anonymity is shattered when the individual can point to individual recognition. In a town in which there was only one Mohammedan lawyer or doctor a statement that a Mohammedan doctor or lawyer was guilty of malpractice, while obviously a combination of two large group terms, would nevertheless be understood by those to whom the words were directed to indicate a single individual.[10] If in the course of describing a labor scandal one were to say that the officers of a local union then engaged in a strike were well known to have been corrupt and to have stolen the funds of the union, if such statement was made without exception so as to indicate the specific officers of a specific local, each of them would have an action for libel. If one were to say of a Board of Aldermen that the members of the Board had conspired against the welfare of their city by awarding corrupt contracts each member of the Board would have a cause of action.[11] It does not matter how large the number, or how great the territory covered by the word used, if in the specific instance it can be pointed out that the large word refers to a person. But where the word is so used that it may be used innocently, as well as in a guilty connection, then there can be no recovery. So to say, that some of the officers, or some of the Aldermen, are guilty of corruption would not give a cause of action to any.[12] The words used must be words of positive identification not of doubtful or various meaning. If there is any question as to whether or not the plaintiff was the person intended then as a matter of law it cannot be said that such

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[8] Lynch v. Kirby, 74 Misc. 266, 131 N.Y. Supp. 680 (1911); Noral v. Hearst Publications, Inc., 40 Cal. App. 2d 348 (1940).

[9] Constitution Pub. Co. v. Way, 94 Ga. 120, 21 S.E. 139 (1893); Willis v. Jones, 13 App. Cas. (D.C.) 482 (1898).

[10] See Ryckman v. Delavan, 25 Wend. (N.Y.) 193, 200 (1840).

[11] See Kirkman v. Westchester Newspapers, Inc., 287 N.Y. 373, 39 N.E. 2d 919 (1942).

[12] Giraud v. Beach, 3 E. D. Smith (N.Y.) 337 (1854); Hauptner v. White, 81 App. Div. 153, 80 N.Y. Supp. 895 (1903).

person has a cause of action, although in cases having a reasonable doubt the court will allow a jury to treat the matter as one of mixed law and fact and to determine whether in law and in fact a specific person was the person intended and damaged.[13]

Conclusion

1. An individual cannot recover in a civil action for a group libel.

2. An individual can recover where a libel seemingly directed at a group is actually directed at the individual.

3. Certain words indicating race, religion, nationality, color, are so vague and indefinite as to describe a group not legally recognizable as a legal entity.

4. No matter how large the term of description it may nevertheless be narrowed to indicate a specific person.

5. Where a group no matter how large has attained legally recognizable form, as in the case of corporations, associations, and partnerships, they have sufficient legal form to be recognizable as a legal party.

6. A libel directed against such a group does not afford action to the officers or members of such a group.

7. But such officers or members can sue individually when the libel is directed against them as a group so as to identify them.

8. Where a legally definable group is named but the statement is made with regard to only some of them and in such terms that those constituting the "some" cannot be ascertained, then none of the individuals has a right to sue.

9. Where some of a group are named under such circumstances as to cast doubt as to whether or not a specific individual was intended a question of mixed fact and law may arise which is properly left to the determination of a jury.

10. In every case where an individual sues for a group libel the burden is on him to show that the libel was uttered with regard to him and prove that it was a libel of and concerning him as plaintiff.

11. The use of a group term to libel an individual will not serve as a screen.

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[13] International Textbook Co. v. Leader Publishing Co., 189 Fed. 86 (N.D. Ohio 1910).